FILED

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No.

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1996

In Re: JAMES CONSTANT

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

James Constant
1603 Danbury Dr
Claremont, CA 91711
(909) 624-1801

23 pp

QUESTIONS PRESENTED

1. Does the Ninth Circuit appeal court lack jurisdiction to docket appeals directed to the Federal Circuit?

2. Does the Ninth Circuit appeal court have the power to require an appellant to obtain counsel before he can appeal?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all persons against whom relief is sought is as follows: FLETCHER, BRUNETTI and NOONAN, Circuit Judges, Ninth Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996
MOTION FOR MANDAMUS

Debtor-appellant James Constant respectfully prays that a writ of mandamus issue to vacate the judgements of the Ninth Circuit court of appeals.

OPINIONS BELOW

The opinions of the Ninth Circuit court of appeals appear in APPENDICES A and B and are unpublished.

JURISDICTION

The date on which the Ninth Circuit court of appeals decided my case was 30 September, 1996. No petition for rehearing was permitted. APP. A.

The jurisdiction of this Court is invoked under 28 USC 1651 and Rule 20 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3(c) and (d); bankruptcy statutes 11 USC 363 (e) and (f) (1) , 11 USC 544 (b) ; jurisdictional statutes 28 USC 158(b) and (d), 28 USC 1291, 28 USC 1294, 28 USC 1295 (a) (1) , 28 USC 1334 (e) , 28 USC 1338(a), patent statute 35 USC 261; and Fifth Amendment are set forth in APPENDIX C.

STATEMENT OF THE CASE

In the bankruptcy court appellants objected to the sale of patents on grounds, first, the bankruptcy court lacks jurisdiction over patents under 28 USC 1334(e) (under patent statute 35 USC 261 debtor is not the owner of patents), second, the bankruptcy court failed to provide adequate protection of non-debtor lienholder's lien under 11 USC 363(e) and, third, applicable nonbankruptcy law 35 USC 261 prohibits the voiding, assignment, and sale of patents under 11 USC 363(f)(1) and 11 USC 544(b). The bankruptcy court dismissed appellant's objections and appellants appealed directing their appeals to the Federal Circuit. Appeals were sent by the bankruptcy clerk to the Ninth Circuit appeal court in violation of FRAP 3(d).

The appeal court denied my motion to transfer appeal to the Federal Circuit and rejected my appeal under a pre-filing order which allows appeal only if I were represented by counsel. APP. A.

REASONS FOR GRANTING THE PETITION

Debtor-appellant James Constant moves the Court to:

1. Vacate the appeal court's order filed 30 September, 1996 as to cases No. 96-56122 and No. 96-56123[1], APP. A, and order the appeal court to transfer appeal to the Federal Circuit on grounds, first, the appeal court lacks jurisdiction to

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1 Case No. 96-56122 appeal by debtor James Constant; Case No. 96-56123 appeal by non-debtor Argerey Constant lienholder and owner of patents at bar.

docket appeals directed to the Federal Circuit, second, the bankruptcy court and bankruptcy appeal panel, from whose orders appeals are taken, lack jurisdiction over patents at bar under 28 USC 1334(e) (patents belong to non-debtor) and, third, the Federal Circuit has exclusive jurisdiction over patent matters.

2. Order the appeal court to actually litigate and expressly decide the jurisdictional questions raised by appellants in the bankruptcy court and Ninth Circuit appeal court. Federal appellate court has special obligation to satisfy itself not only of its own jurisdiction, but also the jurisdiction of lower courts in case under review. Bender v. Williamsport Area School District (US 1986) 89 LED2d___, 106 SCt 1326.

3. Vacate the pre-filing order relied on by the appeal court to reject my appeal in case No. 96-56122, APP. B. , on grounds the Ninth Circuit appeal court lacks power to require me to obtain counsel before I can appeal.

4. order the appeal court to actually litigate and explicitly decide the jurisdictional questions raised by debtor in related adversary cases relied on by the appeal court's pre-filing order. Bender, supra.

I. Federal Rule of Appellate Procedure 3

1. The appeal court's order denying appellant's motion, APP. A, violates appellant's rights, first, "to name the court to which appeal is taken" pursuant to FRAP 3(c) and, second, to have the clerk of the district court comply with its duty to send a copy of the notice "to the clerk of the court of appeals named in the notice" pursuant to FRAP 3 (d). Appellant's notices are named NOTICE OF APPEAL TO THE UNITED

STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, R-418[2]. While the Bankruptcy Appellate Panel clerk clearly failed its duty under FRAP 3(d) to forward appeals to the Federal Circuit, the appeal court lacks jurisdiction to docket appellant's appeals directed to the Federal Circuit. Because the timely filing of a notice of appeal is "mandatory and jurisdictional", United States v. Robinson 361 US 220,224, 80 SCt 282, 4 LEd2d 259 (1960), compliance with the provisions of Rule 3 is of the utmost importance. See General Note to FRAP 3.

2. Any action by the appeal court in the present appeal, other than ordering the clerk of the the appeal court to forward appellant's appeals and papers filed in the appeal court to the Federal Circuit, is a clear usurpation of jurisdictional powers in violation of FRAP 3(d).

3. Rules which judges do not follow serve no purpose.

II. Pre-Filing Order

1. The pre-filing order, APP. B, relied on by the appeal court to reject my appeal, which allows me to appeal only if represented by counsel, is a local practice which defeats my federal rights. If I am competent to represent myself, the appeal court lacks power to force me to accept representation by counsel. Lee v. State of Alabama (CA5 1968) 406 F2d 466 cert. den., 89 S.Ct. 1787, 395 US 927, 23 LED2d 246 reh. den., 90 SCT 44, 396 US 871, 24 LEd2d 129. I have a statutory right under 28 USC 1654 to self-representation and I

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2 Letters and numbers refer to the documents and pages of documents located at the same page number in Debtor's Appendix filed with Debtor's Informal Brief in the appeal court, served 16 September, 1996.

have the right to join in the lienholder's, Mrs Constant's, brief in the appeal court to support my own claims. The appeal court's order cites no authority that gives it power to deprive me of my right to self-representation. A necessary part of the right to self-representation is that a litigant, especially in a civil case, cannot be coerced into accepting counsel rather than proceeding pro-se. Neither the appeal court's authority nor duty extend beyond urging debtor to obtain legal counsel. Andrews v. Bechtel Power Corp. (CAl 1985), 780 F2d 124,137 cert. den., 106 SCt 2896, 476 US 1172, 90 LEd2d 983. Judges cannot insist that a litigant obtain counsel. U.S. v. Warner (CA8 1970) 428 F2d 730 cert. den., 91 SCt 194, 400 US 930, 27 LEd2d 191. The assertion of federal rights is not defeated under the name of local practice. Davis v. Wechsler 263 US 22,24.

2. The pre-filing order is particularly chilling because it is based on the same judgements in related adversary cases relied on by the trustee to defeat my appeal, judgements which I claim are invalid for lack of jurisdiction of the subject matter and for which I seek declaratory relief against judges of the appeal court for making these judgements in the clear lack of all jurisdiction. Collateral attack is permitted because the jurisdictional questions raised by me in those earlier cases were not actually litigated and expressly decided. Fed. Practice and Procedure, Wright, Miller, Cooper Section 3536 footnote 5 (numerous citations); footnote 12 (citing the Restatement of Judgements 12); footnotes 15 and 16. The earlier judgements in related adversary cases relied on by the trustee and relied on by the appeal court's pre-filing order

would work manifest injustice on appellants, by depriving appellants of an appeals procedure to substantively and evidentially attack the earlier decisions before the same courts that rendered them. Spindelfabrik et als v. Schubert et als (CAFC 1988) 9 USPQ2d 1743.

CONCLUSION

My Petition for writ of mandamus should be granted.

Dated: 27 October, 1996

Respectfully submitted

James Constant
1603 Danbury Dr.
Claremont, CA 91711
(909) 6624-1801

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 30, 1996

In re: JAMES CONSTANT, Debtor.	Nos.	96-56122 96-56123
JAMES CONSTANT, ARGERY CONSTANT, Apellants, vs. DAVID L. RAY, Appellee.	BAP#	CC-95-1848-BvH
		ORDER

Before: FLETCHER, BRUNETTI and NOONAN, Circuit Judges

Appellants, motion to transfer these appeals to the Federal Circuit is denied. Appeal no. 96-56122, filed by James Constant, was opened in error, as James Constant is subject to a pre-filing review order in this court. Upon review of the notice of appeal and accompanying documents in that appeal pursuant to the pre-filing review order entered in docket no. 94-80318, this court hereby rejects the appeal for lack of merit and directs the Clerk to close appeal no. 96-56122 as opened in error and to lodge without filing the appeal and this order in docket no. 94-80318. No motions for reconsideration, modification, clarification or rehearing of this order shall be filed or entertained.

A review of the record in appeal no. 96-56123 demonstrates that the appeal may be appropriate for summary dis-

position because the questions on which the decision in the appeal depends may be so insubstantial as not to justify further proceedings. See 9th Cir. R. 3-6.

Within 21 days from entry of this order, appellant Argery Constant shall show cause why the judgment in this appeal should not be summarily affirmed. Appellee may file a reply to appellant's response within ten days from service of the response. Appellant's failure to comply with this order shall result in the automatic dismissal of this appeal by the Clerk for failure to prosecute. 9th Cir. R. 42-1. Briefing is suspended during the pendency of this order to show cause.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 20, 1996

In re: JAMES CONSTANT,) No. 94-80318
Respondent) ORDER

Before: BROWNING, FARRIS AND LEAVY,
Circuit Judges

On September 28, 1994, this court issued an order directing respondent James Constant to respond and show cause why this court should not enter the following pre-filing review order. This court has reviewed and considered the response to the order to show cause, and hereby enters the following pre-filing review order.

Respondent's failure to comply with the order shall result in any new appeal(s) he seeks to file being dismissed or not being filed and other sanctions being levied against respondent, such as a monetary judgment or a judgment of contempt, as the court may deem appropriate. The Clerk shall accept no further filings in this closed docket.

Pre-Filing Review Order

(1) This pre-filing review order shall apply to all notices of appeal and petitions for extraordinary writs filed by respondent, in whole or in part, if he proceeds pro se. This order shall not apply to appeals or petitions in which respondent has counsel or where the district court has expressly certified in its order that the appeal or petition is not frivolous. Should respondent fail to comply with any of the provisions

of this prefiling review order, the Clerk shall not file the document and shall return the document to respondent, informing him of the deficiencies and granting him 14 days to correct the deficiency.

(2) Each notice of appeal or petition filed by respondent shall comply with the requirements of the Ninth Circuit Rules and the Federal Rules of Civil and Appellate Procedure, especially Federal Rule of Civil Procedure 54(b) and Federal Rule of Appellate Procedure 4(a), and shall contain the following sentence in capital letters "THIS NOTICE OF APPEAL/PETITION IS FILED SUBJECT TO PRE-FILING REVIEW ORDER No. 94-8031811" in the body of the notice of appeal or petition.

(3) Each of respondent's future notices of appeal and petitions shall include a copy of the order(s) of the district court from which he is appealing, a short and plain statement of the facts or law on which he will rely for the purposes of the appeal, and a statement thatxnot previously appealed this order or raised this issue in a prior appeal or petition.

(4) If respondent's future notices of appeal and petitions are submitted in compliance with this order, the Clerk shall lodge the notice of appeal or petition and accompanying documents. The Clerk shall not file the appeal or petition or establish a presumptive schedule for the certificate of record, briefing, or transcripts except upon further order of the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL RULE OF APPELLATE PROCEDURE 3

(c) ... A notice of appeal ... must name the court to which the appeal is taken. ...

(d) ... The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. ...

11 USC 363(e) ADEQUATE PROTECTION OF INTERESTS IN PROPERTY

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 USC 363(f)(1) SALES SUBJECT TO APPLICABLE NONBANKRUPTCY LAW

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

11 USC 544(b) VOIDANCE OF TRANSFERS SUBJECT TO APPLICABLE NONBANKRUPTCY LAW

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor

that- is voidable under **applicable law** by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 of this title.

28 USC 158 APPEALS TO BANKRUPTCY APPELLATE PANELS

(b) The judicial council of a circuit shall establish a bankruptcy appellate panel.....

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgements, orders, and decrees entered under subsections (a) and (b) of this section.

28 USC 1291 JURISDICTION OF APPEALS COURTS

The courts of appeals (other than the Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States .... The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 USC 1294 CIRCUITS IN WHICH DECISIONS ARE REVIEWABLE

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals ...

28 USC 1295 JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction - (1) of an appeal

from a final decision of a district court of the United States, if the jurisdiction of that court was based, in whole or part, on section 1338 of this title ...

28 USC 1334 JURISDICTION OVER PROPERTY IN BANKRUPTCY CASES AND PROCEEDINGS

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 USC 1338 JURISDICTION OF PATENT SUITS

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents ...

35 USC 261 OWNERSHIP AND ASSIGNMENT INTERESTS IN PATENTS

.....patents, or any interest therein, shall be assignable in law'by an instrument in writing. The ... patentee, or his assigns or legal representatives may in like manner may in like manner grant and convey an exclusive right under his ... patents, ... An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from the date or prior to the date of such subsequent purchase or mortgage.

AMENDMENT V UNITED STATES CONSTITUTION

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken ior public use without just compensation.

No. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1996

In Re: JAMES CONSTANT

PROOF OF SERVICE

I, James Constant, declare that on this date, 27 October, 1996, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR WRIT OF MANDAMUS on each party to the above proceeding and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first class postage pre-paid.

The names and addresses of those served are:

Fletcher, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
San Fransisco, California 94119-3939

Brunette, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
San Fransisco, California 94119-3939

Noonan, Circuit Judge
United States Court of Appeals for the Ninth Circuit
121 Spear Street, PO Box 192939
San Fransisco, California 94119-3939

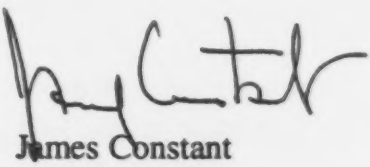
Gordon Stone III
SALTZBURG, RAY & BERGMAN
10960 Wilshire Boulevard, 10th Floor
Los Angeles, California 90024-3702

Office of the United States Trustee
300 North Los Angeles Street, Room 3101
Los Angeles, California 90012

Argerey Constant
1603 Danbury Dr
Claremont, CA 91711

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 27 October, 1996



James Constant
1603 Danbury Dr
Claremont, CA 91711
(909) 624-1801

Supreme Court, U.S.
FILED
FEB 28 1997

No. 96-1178

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term 1996

In re: JAMES CONSTANT, *Petitioner*

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PETER A. DAVIDSON
Counsel of Record for
Respondent **Chapter 7 Trustee David L. Ray**

SALTZBURG, RAY & BERGMAN LLP
10960 Wilshire Boulevard
Tenth Floor
Los Angeles, California 90024
(310) 444-6400

10 PP

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No. 96-1178

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term 1996

In re: JAMES CONSTANT, *Petitioner*

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

David L. Ray, the Chapter 7 trustee in petitioner/debtor James Constant's bankruptcy, submits this brief in opposition to Mr. Constant's petition for writ of mandamus. The petition should be denied on grounds of mootness and because it fails to satisfy any of the criteria for issuance of an extraordinary writ.

STATEMENT OF THE CASE

I. The Bankruptcy Proceeding and the Prior Adversary Action

This is not Mr. Constant's first petition to this Court arising out of this bankruptcy proceeding. In a previous adversary action, trustee Ray sued Mr. Constant's wife, Argerey Constant, to return to the bankruptcy estate 22 United States patents that Mr. Constant had fraudulently transferred to her (for purported consideration of $10.00) to frustrate Mr. Constant's judgment creditors. Trustee Ray prevailed against Mrs. Constant at trial of the adversary action, and the Bankruptcy Court for the Central District of California ordered the patents returned to the bankruptcy estate for liquidation by the trustee.

Mr. and Mrs. Constant appealed the adverse judgment in the adversary action to the Ninth Circuit. In that appeal, the Constants asserted the very same jurisdictional and patent law arguments that Mr. Constant seeks to reassert in the present petition for mandamus. The Ninth Circuit rejected each of these arguments. *In re Constant*, No. 94-55053, slip op. (9th Cir. Sept. 12, 1994) (App. 22, 23 n.1, 27 ¶ 2). This Court denied the Constants' petition for writ of certiorari. 115 S. Ct. 729 (1995) (No. 94-782).

II. The Bankruptcy Court's Order Approving the Sale of Patents

Having successfully returned the 22 patents to the estate, trustee Ray proceeded to liquidate the estate's assets. Pursuant to 11 U.S.C. § 363(b), trustee Ray moved the bankruptcy court for an order authorizing the trustee to sell the patents to a good faith purchaser for $15,000.00. Notice of the motion and proposed sale were provided to the Constants and the creditors, and an overbid procedure was set up whereby the creditors and others had the right to bid in excess of $15,000.00 for the patents.

Mr. and Mrs. Constant filed objections to the motion and the sale. The Constants' opposition to the sale did not dispute the trustee's assessment of the fairness of the $15,000.00 price for the patents. The Constants did not submit a competing bid for the patents. Instead, the Constants objected to the sale based on the same jurisdictional and patent law theories which the Ninth Circuit had expressly repudiated in the previous adversary action.

On June 13, 1995, there being no competing bids to purchase the patents, the bankruptcy court overruled the Constants' objections and authorized the trustee to sell the patents. In approving the sale, the bankruptcy court found the purchaser to be "a good faith purchaser under 11 U.S.C. section 363(m)" and the sale of the patents to be "in the best interests of the creditors of this estate." App. 13, 15 ¶ 6, 16 ¶ 11.

III. The Constants' Failure to Secure a Stay of the Sale of the Patents

The Constants appealed the bankruptcy court's order to the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP"). The Constants failed to post a bond or otherwise seek a stay of the bankruptcy court's order or of the sale itself pending such appeal. The Bankruptcy Code expressly requires such a stay to preserve the right to challenge the validity of the sale on appeal. 11 U.S.C. § 363(m). With no stay having been sought or issued, and the bankruptcy court having approved the sale, the trustee on July 11, 1995 executed the assignment of the patents to the good faith purchaser in exchange for receipt of $15,000.00. App. 29, 30 ¶¶ 2 & 3, 31-32.

The BAP, upon being presented with evidence of the sale, dismissed the Constants' appeal as moot. *In re Constant*, No. CC-95-1848-BaVH (Bankr. 9th Cir. May 16, 1996) (App. 17). The BAP based its decision both on the Constants' failure to obtain a stay of the sale of the patents and their failure to join the purchaser as a party on appeal. App. 20.

IV. The Constants' Attempted Appeal to the Federal Circuit

The Constants proceeded to appeal the BAP's decision. The Constants filed a notice of appeal purporting to direct their appeal to the Federal Circuit rather than to the Ninth Circuit, the regional Court of Appeals having jurisdiction of bankruptcy appeals from the Central District of California.

The Constants' strange choice of Courts of Appeals has two explanations. First, the Ninth Circuit in the Constants' earlier appeal in the adversary action had ruled

against them on the very issues they sought to raise on their present appeal. Second, the Ninth Circuit had previously issued a Pre-Filing Order against Mr. Constant. This Pre-Filing Order sought to curtail the stream of frivolous appeals filed by Mr. Constant, by requiring court approval before Mr. Constant's pro se appeals were docketed.[1] Though the Federal Circuit had previously sanctioned Mr. Constant for his "recreational litigation" and "continuous abuse of the appellate process," *Constant v. United States*, 929 F.2d 654, 658-59 (Fed. Cir.), *cert. denied*, 111 S. Ct. 2799 (1991), it had not entered a pre-filing order against him.

The Constants' attempt at appellate forum shopping was rebuffed by the Clerk of the BAP, who directed the appeal to the Ninth Circuit according to the established rules of Bankruptcy Procedure. The Ninth Circuit then reviewed Mr. Constant's appeal and rejected its filing "for lack of merit" under the terms of the Pre-Filing Order. *In re Constant*, No. 96-56122 (9th Cir. Sept. 30, 1996) (Mr. Constant's petition, App. A). The Ninth Circuit, however, accepted Mrs. Constant's appeal for filing. The Ninth Circuit affirmed the BAP's dismissal of the appeal on the basis that the Constants' failure to secure a stay of the sale of the patents, and to join the purchaser as a party on appeal, rendered the appeal moot. Mrs. Constant has filed a separate, currently pending mandamus petition to this Court (No. 96-1177) challenging the Ninth Circuit's decision.

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[1] A copy of this Pre-Filing Order is appended to Mr. Constant's petition (App. B). Mr. Constant's copy incorrectly notes the date of this order as October 20, 1996. The correct date of the Pre-Filing Order is October 20, 1994.

V. Mr. Constant's Previous Petition to this Court to Vacate the Pre-Filing Order

Mr. Constant's present petition for mandamus, in addition to challenging the trustee's sale of the 22 patents, also seeks to vacate the Ninth Circuit's Pre-Filing Order. Mr. Constant's challenge to the Pre-Filing Order is virtually identical to his earlier unsuccessful mandamus petition to this Court which also sought to vacate the Pre-Filing Order. The Court has already denied Mr. Constant's request for relief. *In re Constant*, 115 S. Ct. 1178 (1995) (No. 94-1257).

ARGUMENT

I. Mr. Constant's Petition Has Been Mooted by His Failure to Stay the Sale of Patents and to Join the Purchaser on Appeal

Notwithstanding Mr. Constant's many claims of error by the court below, his mandamus petition and the issues it seeks to raise have been mooted by Mr. Constant's failure to stay the sale of the patents to the good faith purchaser. The Bankruptcy Code is clear: absent a stay pending appeal, the sale of the estate's property to a good faith purchaser cannot be undone even if the purchaser knew of the pendency of the appeal:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). *See Ewell v. Diebert*, 958 F.2d 276, 282 (9th Cir. 1992) ("The Debtor's appeals are moot. Because the Buyer was a good faith purchaser, under 11 U.S.C. § 363(m) the sale may not be modified or set aside on appeal unless the sale was stayed pending appeal. It was not, and the court thus cannot grant any effective relief.").

Further, Mr. Constant's failure to name the purchaser as a party to the appeal renders his petition moot. *In re Royal Properties, Inc.*, 621 F.2d 984, 986-87 (9th Cir. 1980) (rejecting as moot an appeal from bankruptcy court order approving sale of property to non-party -- even if purchaser were not a good faith purchaser, no relief could be granted vis-a-vis non-party).

The mootness of Mr. Constant's petition divests this matter of the live case or controversy prerequisite of Article III of the Constitution. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987). Accordingly, the petition should be dismissed. *See, e.g., In re Vasquez*, 506 U.S. 914 (1992) (dismissing mandamus petition on mootness grounds).

II. Mr. Constant's Petition May Not Challenge Prior Adverse Decisions

In addition to being moot, Mr. Constant's petition also improperly seeks to relitigate prior adverse decisions that have already been fully litigated, including the Ninth Circuit's Pre-Filing Order and the bankruptcy court's judgment in the adversary action. Mr. Constant has previously unsuccessfully argued both these matters in the Ninth Circuit, and this Court has denied his petitions for writs of certiorari and mandamus. *In re Constant*, No. 94-55053, slip op. (9th Cir. Sept. 12, 1994) (App. 22, 23 n.1, 27 ¶ 2), *cert. denied*, 115 S. Ct. 729 (1995) (No. 94-782); *In re Constant*, 115 S. Ct. 1178 (1995) (No. 94-1257). Pursuant to Supreme Court Rule 20(1), a petition for mandamus must show, *inter alia*, that it is "in aid

of the Court's appellate jurisdiction" and "that adequate relief cannot be obtained in any other form or from any other court." Since the Court previously had jurisdiction of these matters and denied review, the present petition for mandamus is clearly inappropriate. *See Ex Parte Morgan,* 114 U.S. 174, 175 (1885) ("If there is error in the judgment as rendered it cannot be corrected by mandamus, but resort must be had to a writ of error or an appeal.").

Further, Mr. Constant's attempted relitigation of these matters is clearly precluded by the doctrines of res judicata and collateral estoppel. Mr. Constant has already lost on all these issues, including the entry of the Pre-Filing Order, the jurisdiction of the bankruptcy court over the patents, and his patent law theories. Mr. Constant cannot now relitigate these matters. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979) (party who loses issue in prior lawsuit after having had a "full and fair" opportunity to litigate it is precluded by collateral estoppel from rearguing issue in subsequent lawsuit); *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (res judicata bars relitigation of all claims and defenses that were previously available between the parties in prior lawsuit regardless whether or not they were asserted).

III. No Error Was Committed by the Court Below

In addition to being moot and procedurally barred, the petition also fails to demonstrate "exceptional circumstances" warranting the Court's exercise of its discretionary powers to issue the extraordinary writ. Sup. Ct. R. 20(1). The Court's issuance of the extraordinary writ "is not a matter of right, but of discretion sparingly exercised." *Id.* In the present case, the petition fails to show any error by the court below, let alone extraordinary circumstances justifying a writ.

Mr. Constant's contention that the bankruptcy court lacked jurisdiction over this matter is baseless. The

bankruptcy court plainly had jurisdiction of the original adversary action between trustee Ray and Argerey Constant, which was a "core" proceeding under the Bankruptcy Code wherein the trustee returned to the bankruptcy estate the 22 patents that Mr. Constant had previously fraudulently transferred to his wife. 11 U.S.C. § 544(b); 28 U.S.C. §§ 157(b)(1), 157(b)(2)(H), 1334. Likewise, the bankruptcy court plainly had jurisdiction to approve the sale of the patents once they had been returned to the bankruptcy estate. 11 U.S.C. § 363(b)(1); 28 U.S.C. §§ 157(b)(1), 157(b)(2)(A), (O), 1334. The fact that Mr. Constant asserted a legally baseless patent law objection against the sale of the patents did not convert this bankruptcy action into one arising under the patent laws. *Cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988) ("a case raising a federal patent-law defense does not, for that reason alone, 'arise under' patent law, 'even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.'").

Mr. Constant's contention that he had a right to appeal the bankruptcy court's order approving the sale of patents to the Federal Circuit, rather than to the Ninth Circuit, is likewise baseless. Since, as shown above, original jurisdiction of this bankruptcy proceeding existed under the bankruptcy laws, appellate jurisdiction properly resided in the Ninth Circuit as the regional court of appeals. 28 U.S.C. §§ 158(d), 1291. Appellate jurisdiction did not exist in the Federal Circuit, since the action did not arise under the patent laws. 28 U.S.C. §§ 1291, 1295(a)(1), 1338(a).

Mr. Constant's previously rejected patent law theory, that the assignment provisions of the patent laws (35 U.S.C. § 261) somehow prevented the bankruptcy court's disposition of the patents, is also baseless. Nothing in the patent laws prevented the bankruptcy court's straight-forward application of California's Uniform Fraudulent

Transfer Act in the adversary action to avoid Mr. Constant's fraudulent transfer of his patents to his wife. *See* 11 U.S.C. § 544(b) (authorizing trustee to avoid transfers voidable under "applicable law"). The assignment provisions of the patent laws merely provide that "[a]n assignment . . . shall be void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, unless it is recorded" in the Patent Office. 35 U.S.C. § 261. In any event, as previously ruled by the Ninth Circuit in the adversary action, these provisions would not be implicated in the present case since the bankruptcy court had "explicitly found that Mrs. Constant did not act in good faith and was not entitled to the patents." *In re Constant*, No. 94-55053, slip op. (9th Cir. Sept. 7, 1994) (App. 27 ¶ 2), *cert. denied*, 115 S. Ct. 729 (1995).

As this Court held in *Allen v. Riley*, 203 U.S. 347 (1906), the patent laws' assignment provisions leave the states with "the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud." *Id.* at 355. "[Congress] has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various States the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee." *Id.* at 356.

Finally, Mr. Constant's second challenge to the Pre-Filing Order is baseless. Trustee Ray will not recount here Mr. Constant's long history of frivolous litigation and abuse of the appellate process. Appended to this brief is the original opposition to Mr. Constant's previous identical mandamus petition to this Court challenging the Pre-Filing Order. App. 33. This original opposition lists in detail Mr. Constant's many frivolous appeals and demonstrates that the Ninth Circuit was well within its discretion to impose limits

on Mr. Constant's vexatious appellate practice. Mr. Constant should not be heard to complain that the Ninth Circuit, after reviewing his latest frivolous appeal and finding it to lack merit, ordered that it not be filed.

CONCLUSION

Mr. Constant's petition for mandamus simply repeats the same frivolous arguments that he lost in his earlier lawsuits and in his earlier petitions to this Court for writs of certiorari and mandamus. Even if Mr. Constant's petition were not mooted by his failure to obtain a stay of the trustee's sale of the patents and to join the purchaser on appeal, there would be no basis for upsetting the decision of the lower court. Trustee Ray respectfully requests that the petition be denied.

Dated: February 26, 1997 Respectfully submitted,

PETER A. DAVIDSON
Counsel of Record for
Respondent Chapter 7
Trustee David L. Ray

SALTZBURG, RAY &
BERGMAN LLP
10960 Wilshire Boulevard
Tenth Floor
Los Angeles, California 90024
(310) 444-6400

APPENDIX

APPENDIX

Opinions, Orders and Judgments

Order of U.S. Bankruptcy Court Approving Trustee's Sale of United States Patents, dated June 8, 1995 13

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[FILED JUNE 8, 1995]

GORDON P. STONE III, State Bar No. 169579
SALTZBURG, RAY & BERGMAN
A Partnership Including Professional Corporations
10960 Wilshire Boulevard
Tenth Floor
Los Angeles, California 90024-3713

Attorneys for DAVID L. RAY, Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	)	Case No. LA 89-19270-KL
	)	Chapter 7
JAMES CONSTANT,	)	
	)	ORDER APPROVING
Debtor	)	TRUSTEE'S SALE OF
	)	UNITED STATES
	)	PATENTS
	)	
	)	DATE: June 8, 1995
	)	TIME: 10:00 a.m.
	)	CTRM: 1339
	)	255 E. Temple St.
_____	)	Los Angeles, CA

The hearing on the Chapter 7 Trustee's Motion for Order Approving the Sale of United States Patents was held on June 8, 1995 at 10:00 a.m., in Courtroom 1339, located at 255 E. Temple Street, Los Angeles, California. Gordon P.

Stone, III appeared on behalf of David L. Ray, the Chapter 7 Trustee. All other appearances are duly noted in the Court record.

After reviewing the Notice of Motion, the Motion and all evidence set forth therein and appended thereto, the Debtor's AND Argerey Constant's Opposition, and any and all arguments made at the time of hearing, and finding that notice of the Motion was timely and properly given, and there being no other bidders at the sale, and that good cause exists for the Motion, the Court hereby orders as follows:

1. IT IS HEREBY ORDERED that the Motion for Order Approving Sale of United States Patents ("the Motion") is granted in its entirety.

2. IT IS FURTHER ORDERED that the Trustee's sale of the following twenty-two (22) United States Patents ("the Patents"), personal property of the bankruptcy estate of the above-entitled debtor, for the sum of $15,000.00 cash to Advanced Micro-Devices, Inc. is approved.

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,998,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481

United States Patent No. 4,156,919
United States Patent No. 4,165,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930

A true and correct copy of the Agreement for Sale, Purchase and Assignment of United States Patents is attached to the Motion and is incorporated herein by this reference.

3. IT IS FURTHER ORDERED that the Trustee is authorized to execute any and all documents and take all acts necessary to carry out the terms of the sale.

4. IT IS FURTHER ORDERED that there are no known encumbrances on the Patents and the Patents are sold free and clear to Advanced Micro-Devices, Inc., Advanced Micro-Devices having waived any right, title or interest it may have in the proceeds of the sale of the Patents.

5. IT IS FURTHER ORDERED that notice of the Motion was sent to all known creditors and parties-in-interest in this case pursuant to the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. This Notice advised the recipient of the appropriate procedure to oppose this Motion or overbid on the Patents.

6. IT IS FURTHER ORDERED that the sale of the Patents will benefit and is in the best interests of the creditors of this estate.

7. IT IS FURTHER ORDERED that the overbidding procedure as outlined in the Notice and the Motion was, in all respects, proper under the applicable provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. No overbids were received pursuant to this procedure or at the hearing on the Motion when called for by the Court.

8. IT IS FURTHER ORDERED that this Court has jurisdiction over the authorization of the sale of the Patents pursuant to 28 U.S.C. Sections 157(a) and 1334(a) and (d).

9. IT IS FURTHER ORDERED that the sale, including the hearing thereon, constitutes a core proceeding within the meaning of 28 U.S.C. Section 157(b)(2).

10. IT IS FURTHER ORDERED that the applicable bankruptcy code section governing the Trustee's right to sell the Patents is 11 U.S.C. Section 363.

11. IT IS FURTHER ORDERED that Advanced Micro-Devices, Inc. constitutes and is a good faith purchaser under 11 U.S.C. section 363(m).

12. IT IS FURTHER ORDERED that the sale of the Patents is devoid of any express or implied warranty, including, but not limited to fitness, condition, or use. Additionally, the Trustee has made and makes no representations, warranties, or covenants regarding the sale. This sale is on an "as is, where is" basis.

DATED: June 8, 1995 KATHLEEN T. LAX
United States Bankruptcy Judge

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re	)	BAP No. CC-95-1848-BaVH
	)	
JAMES CONSTANT,	)	BK No. LA89-19270 KL
	)	
Debtor.	)	
JAMES CONSTANT and ARGEREY CONSTANT	)	
	)	MEMORANDUM
Appellants,	)	
	)	
v.	)	
	)	
DAVID L. RAY, Chapter 7 Trustee,	)	
	)	
Appellee.	)	

Submitted without Oral Argument February 22, 1996
at Pasadena, California

Filed - MAY 16 1996

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Kathleen T. Lax, Bankruptcy Judge, Presiding
Before: BAUM,[1] VOLINN and HAGAN, Bankruptcy Judges.

---

[1] The Honorable Redfield T. Baum, Bankruptcy Judge from the District of Arizona, sitting by designation.

Debtor appeals the court's order approving the sale of approximately twenty patents. Prior to reaching the merits of the appeal this Panel has considered the Trustee's motion to dismiss for mootness. For the reasons stated below, this appeal is dismissed as moot.

FACTUAL BACKGROUND

James Constant ("Debtor") was the owner of some twenty-two patents. On August 24, 1988, Debtor transferred the patents to his wife, Argerey Constant ("Argerey") for a stated consideration of $10.00. On September 13, 1989, Debtor filed for Chapter 11 relief. His case was later converted to Chapter 7 and David Ray ("Trustee") was appointed trustee. Trustee commenced an adversary action to set aside the transfer of the patents as a fraudulent pre-petition conveyance. The bankruptcy court ruled in favor of the Trustee and set aside the transfer. The patents then became property of the estate.

On February 15, 1995, the Trustee was approached by Advanced Micro-Devices, Inc. ("AMD") with an offer to purchase the patents. AMD had previously obtained a judgment lien on the personal property of the Debtor. AMD entered into a written agreement with the Trustee whereby AMD would purchase the twenty-two patents in exchange for $15,000 and AMD's waiver of its rights as a judgment creditor.

On May 18, 1995, the Trustee filed a Motion for Order Approving Sale of Personal Property. The Motion included the sales price and provided an overbid procedure whereby interested parties were provided an opportunity to submit a bid in excess of the $15,000 selling price. Both the Debtor and Argerey objected to the sale arguing that the Trustee had not recorded the transfer of the patents to

himself and thus he could not transfer them. The Constants also argued that AMD could not be a bone fide purchaser in good faith because it was a judgment creditor.

The bankruptcy court overruled the objections and approved the sale by order dated June 13, 1995. There had been no other offers to purchase the patents. The court expressly found that AMD was a good faith purchaser and that the sale was in the best interest of the creditors. Both the Debtor and Argerey have appealed the court's order. The Trustee has filed a motion to dismiss the appeal as moot based on the fact that the Constants failed to seek a stay pending appeal and AMD was not made a party to the appeal.

ISSUE

Whether not having sought a stay and failure to join AMD as a party renders the appeal of the bankruptcy court's order moot.

STANDARD OF REVIEW

Mootness is a Jurisdictional issue which is to be reviewed de novo. In re Baker & Drake. Inc., 35 F.3d 1348, 1351 (9th Cir. 1994).

DISCUSSION

The judicial doctrine of mootness developed from the general rule that the occurrence of events which prevents an appellate court from granting effective relief renders an appeal moot. See Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423 (9th Cir. 1985). The mootness rule applies in bankruptcy when the debtor fails to obtain a stay of an order approving the sale of the debtor's assets. In re Ewell,

958 F.2d 276 (9th Cir. 1992); In re Onouli-Kona Land Co., 846 F.2d 1170 (9th Cir. 1988); In re Royal Properties. Inc., 621 F.2d 984 (9th Cir. 1980).

Section 363(b)(1) of the Code gives the trustee, after notice and a hearing, authority to "use, sell, lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1) (1985). The rights of good faith purchasers of property of the estate are protected by section 363(m). Ewell at 278. Section 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. S 363(m) (1985). Here, because the sale has been completed and the Debtor failed to obtain a stay pending appeal, the validity of the sale cannot be affected on appeal. Therefore, this court cannot grant effective relief.

Further, an appellate court cannot grant effective relief if the purchasers of the property have not been made parties to the appeal. Royal Properties at 987. Where the sale of the property has already been completed and the purchaser is not a party to the appeal, those transfers cannot be voided or rescinded by the court. Id. at 986, citing In re Combined Metals Reduction Co., 557 F.2d 179, 190 (9th Cir. 1977). The Debtor failed to join the purchaser (AMD) as a party to the appeal, further preventing this panel from granting effective relief.

CONCLUSION

Tnis appeal is moot and is therefore DISMISSED.[2]

[2] The appellee, in his brief, has requested an award of sanctions for attorney fees and costs. There has been no formal motion filed for sanctions in this matter. This panel has no authority to award sanctions under these circumstances. In re Sandoval, 186 B.R. 490, 496 (9th Cir. BAP 1995).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JAMES CONSTANT Debtor.	)	No. 94-55053 D.C. No. 93-04392-AWT
DAVID L. RAY, SALZBURG, RAY & BERGMAN, Plaintiff-Appellee,	)	
v.	)	
ARGEREY CONSTANT; JAMES CONSTANT, Defendants-Appellants.	)	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Submitted September 7, 1994**
Filed September 12, 1994

Before: HALL, WIGGINS, and FERNANDEZ, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Chapter 7 debtor James Constant and his wife, Argerey Constant, appeal pro se the district court's (1) dismissal of Mr. Constant's appeal for lack of standing, (2) dismissal of Mrs. Constant's appeal from certain bankruptcy court decisions for lack of jurisdiction, and (2) sanction award. We have jurisdiction under 28 U.S.C. § 158(d)[1] and we affirm.

I
Standing

Mr. Constant contends that the district court erred by not reaching the merits of his appeal on the ground that he lacked standing to appeal. We disagree.

Mr. Constant relies on Justice Stevens's dissenting opinion in Martin v. Wilks for the proposition that interested third parties who have no right to appeal from a final judgment nevertheless may collaterally attack the judgment. See 109 S. Ct. 2180, 2189 (1989) (Stevens, J., dissenting). Although a third party may under certain circumstance be able to collaterally attack a judgment, see, e.g., Wells Fargo & Co. v. Taylor, 254 U.S. 175, 184 (1920), a third party whose motion to intervene is denied is not a party and may

[1] We reject the Constants' contention that because the district court dismissed their appeal on standing and jurisdictional grounds, the district court's decision was not final and appealable. See McGuckin v. Smith, 974 F.2d 1050, 1053 (9th Cir. 1992) (dismissals based on lack of jurisdiction are final and appealable). We also reject the Constants' contention that the bankruptcy and district courts lacked subject-matter jurisdiction over the trustee's action to recover fraudulently conveyed patents from Mrs. Constant, and the Constants' appeal from the final judgment in that action. See 28 U.S.C. §§ 157(b) (1) (bankruptcy judge may hear and determine core proceeding), 157(b) (2) (H) (action to recover fraudulent conveyance is core proceeding), 158(a) (district courts have jurisdiction to hear appeals from final judgments of bankruptcy judges).

not appeal directly any subsequent decision, see Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 524 (1947); see also Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378 (1987). Moreover, in the bankruptcy context, "[o]nly those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have" standing to appeal the order. Tilley v. Vucurevich (In re Pecan Groves), 951 F.2d 242, 245 (9th Cir. 1991).

Here, Mr. Constant's motion to intervene was denied. He therefore was not a party to the adversary proceeding. See Brotherhood, 331 U.S. at 524. Moreover, he has conceded that he had no interest in the patents that were the subject of the adversary proceeding. Thus, he did not have standing to appeal directly the bankruptcy court's decisions to the district court. See id.; In re Pecan Groves, 951 F.2d at 245.

II

District Court's Jurisdiction

Mrs. Constant appealed three bankruptcy court "decisions" to the district court: (1) the March 12, 1993 judgment avoiding as fraudulent Mr. Constant's transfer of certain patents to his wife; (2) the March 15, 1993 order in aid of judgment, directing Mrs. Constant to assign the patents within ten days or the clerk would do so; and (3) the bankruptcy clerk's June 1, 1993 assignment of the patents. The district court concluded that the June 1, 1993 assignment was not an appealable order and that Mrs. Constant's appeal of the other bankruptcy court decisions was untimely. "The timeliness of a notice of appeal is a question of law which we review de novo." Delaney v. Alexander (In re Delaney), No. 93-16217, slip op. 7817, 7819 (9th Cir. July 15, 1994) (per curiam).

First, district courts "have jurisdiction to hear appeals from final judgments, orders, and decrees, and . . . interlocutory orders and decrees, of bankruptcy judges." 28 U.S.C. § 158(a). Here, the June 1, 1993 assignment was not a judgment, order, or decree. Moreover, it was executed by the court clerk, not the bankruptcy judge. Thus, the district court did not err by concluding it was not an appealable order. See id.

Second, a notice of appeal from the bankruptcy court must be filed with the clerk within ten days from the date of entry of the order appealed from. Bankr. R. 8002(a). "The provisions of Bankruptcy Rule 8002 are jurisdictional; the untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the bankruptcy court's order." Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 327 (9th Cir. 1994).

Here, Mrs. Constant filed her notice of appeal on June 8, 1993. Because the notice was not filed within ten days of either the March 12, 1993 judgment or the March 15, 1993 order, the district court properly found it untimely. See Bankr. R. 8002(a).

III
District Court Sanctions

The Constants contend that the district court erred by sanctioning them for filing a frivolous appeal under Fed. R. Civ. P. 11 and Bankr. R. 9011(a) because (1) the sanctions were not based on pleadings signed by the Constants, and (2) the district court never reached the merits of their appeal. We disagree.

A district court reviewing a decision of a bankruptcy court does not have the authority to impose sanctions under

Rule 11, see Akros Installations, Inc. v. Grand Nat'l Bank (In re Akros Installations, Inc.), 834 F.2d 1526, 1531 (9th Cir. 1987), but may impose sanctions under the bankruptcy equivalent to Rule 11, Bankr. R. 9011,[2] see Hedges v. RTC, Nos. 92-16952, 93-15606, slip op. 7713, 7719-20 (9th Cir. July 14, 1994) (per curiam). A court may sanction the signers of a pleading or other paper where the paper is frivolous, meaning it is baseless and done without reasonable inquiry. In re Grantham Bros., 922 F.2d at 1441.

Here, contrary to their contention, the Constants signed the notice of appeal and appellants' brief submitted to the district court. Thus, the district court had authority to sanction them for filing a frivolous appeal. See Bankr. R. 9011.

With respect to Mr. Constant, a reasonable inquiry would have revealed that he lacked standing to appeal because it was clear he was not a party to the adversary proceeding and thus, had no basis to appeal. See Brotherhood, 331 U.S. at 524; see also Oil & Gas Co. v. Duryee, 9 F.3d 771, 773 (9th Cir. 1993) (sanctioning a putative appellant who lacked standing to file bankruptcy petition); cf. Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (reversing sanction award where whether party lacked standing had "not been authoritatively decided by this court"). Accordingly, Mr. Constant's appeal was frivolous. See In re Grantham Bros., 922 F.2d at 1442.

---

[2] Rule 11 recently was amended to remedy problems arising from certain 1983 amendments to the rule. See Fed. R. Civ. P. 11 (as amended Apr. 22, 1993, eff. Dec. 1, 1993) & advisory committee notes to 1993 amendments. Bankr. R. 9011 is "virtually identical" to the pre-1993 version of Rule 11. See Valley Nat'l Bank v. Needler (In re Grantham Bros.), 922 F.2d 1438, 1441 (9th Cir.), cert. denied, 112 S. Ct. 94 (1991).

As to Mrs. Constant, the fact that the district court lacked jurisdiction to consider the merits of her appeal did not preclude it from imposing sanctions. See Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F.2d 797, 801 (9th Cir. 1986); see also Willy v. Coastal Corp., 112 S. Ct. 1076, 1080-81 & n.5 (1992). First, Mrs. Constant argued that the bankruptcy court's judgment violated 28 U.S.C. § 1962 because patents are intangible property with no situs in any state. Section 1962 is not applicable. See 28 U.S.C. § 1962. Moreover, the bankruptcy court had authority to enforce its judgment by directing Mrs. Constant to assign her interest in the patent. See Bankr. R. 7069; Fed. R. Civ. P. 69(a) (enforcement of judgments shall be in accordance with state procedures); Cal. Civ. Proc. Code §§ 695.010 (all property of judgment subject to enforcement), 697.510(a) (judgment lien on personal property), 700.170 (levy on general intangibles).

Second, Mrs. Constant argued that the bankruptcy court's judgment violated 35 U.S.C. § 261 because she was the proper assignee of the patents. The bankruptcy court, however, explicitly found that Mrs. Constant did not act in good faith and was not entitled to the patents. See 11 U.S.C. § 544; Cal. Civ. Code §§ 3439.04, 3439.05. Thus, Mrs. Constant's assignment could not have "trumped" that of the trustee's.

Finally, Mrs. Constant's argued that the trustee's motion for sanctions violated Fed. R. Civ. P. 41(b) because the bankruptcy court already ordered the employment and compensation of certain attorneys for the benefit of the estate. An award of sanctions, however, punishes a party for filing a frivolous action, and does not compensate directly the other side's attorney. See Willy, 112 S. Ct. at 1081.

Based on our review of the Constants' pleadings, the district court did not abuse its discretion by sanctioning the Constants. See Hedges, slip op. at 7720 (reviewing for abuse of discretion).

IV
Appellate Sanctions

The appellee requests that this court impose sanctions against the Constants for filing a frivolous appeal. This court has discretion to impose sanctions for bringing a frivolous appeal, even where a litigant is pro se. 28 U.S.C. § 1912; Fed. R. App. P. 38; Urban v. Commissioner, 964 F.2d 888, 890 (9th Cir. 1992) (per curiam). As appeal is frivolous "if the result is obvious, or the arguments of error are wholly without merit." Wilcox v. Commissioner, 848 F.2d 1007, 1009 (9th Cir. 1988). This court does not impose sanctions lightly as it is aware that an appeal that lacks merit is not always frivolous. Grimes v. Commissioner, 806 F.2d 1451, 1454 (9th Cir. 1986) (per curiam).

Because the Constants' appeal is without merit, we impose sanctions of $1,000. See id.

AFFIRMED.

[FILED: SEPTEMBER 18, 1995]

GORDON P. STONE, III, State Bar No. 169579
SALTZBURG, RAY & BERGMAN
A Partnership Including Professional Corporation
10960 Wilshire Boulevard
Tenth Floor
Los Angeles, California 90024-3713
(310) 473-8405/444-6400

Attorneys for DAVID L. RAY, Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	)	Bankruptcy Case No. LA 89-19270 KL
JAMES CONSTANT,	)	Chapter 7
Debtor.	)	DECLARATION OF CHAPTER 7 TRUSTEE DAVID L. RAY RE ASSIGNMENT OF PATENTS TO ADVANCED MICRO DEVICES, INC.

DECLARATION OF DAVID L. RAY

RE ASSIGNMENT OF PATENTS TO ADVANCED MICRO DEVICES, INC.

I, David L. Ray, declare:

1. I am the duly qualified and acting Chapter 7 Trustee in the bankruptcy case In re James Constant ("Debtor"), appointed on or about June 27, 1990. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would competently testify thereto.

2. On July 11, 1995, acting as trustee in the aforementioned bankruptcy case and having received $15,000.00 consideration therefor, I assigned to Advanced Micro Devices, Inc. the 22 United States patents returned to the bankruptcy estate as a result of the adversary proceeding (No. LA 91-06842-KL) against Argerey Constant. Attached as Exhibit 1 is a true and correct copy of the assignment.

3. At no time has either James or Argerey Constant sought to obtain a stay either of the bankruptcy court's Order Approving Trustee's Sale of United States Patents (entered June 13, 1995) or of the actual sale itself.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of September 1995, at Hilton Head, South Carolina.

David L. Ray
Chapter 7 Trustee

ASSIGNMENT OF UNITED STATES LETTER PATENTS

WHEREAS, I, David L. Ray, am the Chapter 7 Trustee ("Trustee") for the bankruptcy estate of In re James Constant, Case No. LA 89-19270-KL;

WHEREAS, under the United States Bankruptcy Laws, and pursuant to an order of court further described below and appended hereto, the bankruptcy estate of In re James Constant is the owner of the entire right, title and interest in and to the following United States Letter Patents:

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481
United States Patent No. 4,156,919
United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930

(hereinafter "Patents");

WHEREAS, the fraudulent August 24, 1988 assignments by James Constant to Argerey Constant of the above Patents were avoided, and all of the Patents were confirmed the property of the bankruptcy estate and subject to disposition by me, the Trustee, pursuant to United States Bankruptcy Judge Kathleen Lax's March 9, 1993 Judgment (attached hereto as Exhibit A), and in accordance with the United States Bankruptcy Code and Rules;

Pursuant to United States Bankruptcy Judge Kathleen Lax's June 8, 1995 Order Approving Trustee's Sale of United States Patents (attached hereto as Exhibit B), and for good and valuable consideration, receipt of which is hereby acknowledged, David L. Ray, Chapter 7 Trustee, having a place of business at 10960 Wilshire Boulevard, Tenth Floor, Los Angeles, California, hereby sells, assigns, and transfers to Advanced Micro Devices, Inc., a Delaware corporation having a place of business at 1 AMD Place, Sunnyvale, California 94088-3453 and its successors and assigns, the entire right, title and interest, throughout the world in and to each of the above-referenced U.S. Letter Patents.

Executed this 11th day of July, 1995, at Los Angeles, California.

DAVID L. RAY, CHAPTER 7 TRUSTEE

No. 94-1257

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1994

In re: JAMES CONSTANT, *Petitioner*

On Petition for Extraordinary Writ to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

ANTHONY de ALCUAZ
Counsel of Record for
Respondent *Advanced Micro-Devices, Inc.*

SKJERVEN, MORRILL, MacPHERSON,
FRANKLIN & FRIEL
25 Metro Drive, Suite 700
San Jose, California 95110
(408) 283-1222

STATEMENT OF THE CASE

I. Introduction

This proceeding is the latest in an incredible series of lawsuits, appeals and applications for review brought by petitioner James Constant. Most recently, by Order issued January 9, 1995, Mr. Constant's petition to this Court for certiorari in number 94-782 was denied. In 1993, petitioner sought review of another decision by the Ninth Circuit Court of Appeals, under docket 93-1518. That petition was denied by Order issued by this Court on May 16, 1994.

II. The Pre-Filing Review Order

The pre-filing review order which is the subject of this latest petition of Mr. Constant was issued by the Court of Appeals on October 20, 1994. The reasons for this order are readily apparent from the procedural history of Mr. Constant's vexatious litigation, which is set forth below. In petitioner's brief, he challenges not only the issuance of the order, but also the alleged failure of the Court of Appeals to decide petitioner's designated issues on the merits. *See* Petition 7. He also requests that this Court "determine the merits of the questions raised...." *Id.* 10. Thus, petitioner is again attempting to litigate issues previously considered and adjudged against him in earlier appeals.

III. Background Leading to Appeal to This Court in Cause Number 93-1518

Respondent Advanced Micro-Devices, along with Fujitsu Limited and Fujitsu Microelectronics, Inc. filed a

brief in this Court in opposition to one of Mr. Constant's earlier petitions for writ of certiorari mentioned above, number 93-1518. That brief contains a comprehensive summary of petitioner's litigation activities which may be helpful to the Court, and for that purpose, it is set forth verbatim as follows.

"The history of this litigation began in January 1985 when petitioner filed an action in the United States District Court for the Central District of California against the corporate respondents and numerous other high-technology companies. *James Constant v. Advanced Micro-Devices, Inc., et al.,* Case No. 85-0262 SVW (C.D. Cal.) ("Patent Case I"). In that action, petitioner alleged infringement of two of petitioner's patents and also asserted other claims based upon the alleged unconstitutionality of 35 U.S.C. § 282, which authorizes federal courts to adjudicate the validity of patents. The District Court found § 282 to be constitutional and dismissed petitioner's claims unrelated to infringement. Then, in November 1987, the District Court (Judge Stephen V. Wilson presiding), after appointing and receiving recommendations from a special master, granted summary judgment that petitioner's patents at issue in the case were invalid. With this judgment, the District Court also awarded respondents their costs.

"Petitioner prosecuted two separate appeals of the District Court's judgment in Patent Case I to the United States Court of Appeals for the Federal Circuit. In each instance, the decisions of the District Court were affirmed. *See Constant v. Advanced Micro-Devices, Inc.,* 848 F.2d 1560 (Fed. Cir. 1988); *Constant v. Advanced Micro-Devices, Inc.,* 862 F.2d 320 (Fed. Cir. 1988) (mem.). In its

published opinion on the first of these appeals, the Federal Circuit warned petitioner about his already established practice of repeatedly raising previously litigated issues, as follows:

"In the past the appellant has repeatedly attempted to reassert or revive claims and theories after they have been properly dismissed with prejudice by the district court. Appellant is hereby cautioned that if he persists by trying to raise again the same issues that have been finally decided by the district court or by this court, he could be sanctioned under Fed.R.Civ.P. 11, Fed.R.App.P. 38, and the inherent power of the courts to sanction."

Constant, 848 F.2d at 1572.

"In response to the Federal Circuit decisions, petitioner filed two petitions for writ of certiorari. Both petitions were denied. *See Constant v. Advanced Micro-Devices, Inc.,* 488 U.S. 892, 109 S. Ct. 228 (1988); *Constant v. Advanced Micro-Devices, Inc.,* 490 U.S. 1007, 109 S. Ct. 1643 (1989).

"Dissatisfied with the rulings in Patent Case I invalidating his patents, petitioner filed four new lawsuits in the Central District of California in October and November 1987 naming as defendants, among others, Judge Wilson, the special master appointed by Judge Wilson, and several of the defendants and their attorneys in Patent Case I. *See Constant v. Hillman,* Case No. 87-06592 R; *Constant v. Hoff,* Case No. 87-06766 R; *Constant v. Hitachi America, Ltd.,* Case No. 87-07046 R; *Constant v. Wilson,* Case No. 87-07315 R (collectively, "the Fraud Cases"). In these lawsuits,

petitioner sought to collaterally attack the judgment in Patent Case I by claiming that it had been procured through a conspiracy among the defendants, their attorneys, and the federal courts to defraud him. Petitioner also sought to relitigate various issues before the district court in Patent Case I, including whether the proceedings of the patent action violated his right to due process, the constitutionality of 35 U.S.C. § 282, and the constitutionality of summary judgments.

"The Fraud Cases came before Chief Judge Manuel Real, who dismissed the complaints against Judge Wilson and the special master on the grounds of judicial immunity and granted summary judgment as to all other defendants on the basis that the Fraud Cases were an improper collateral attack on the rulings in Patent Case I and that petitioner failed to raise any issue of extrinsic fraud. Judge Real also sanctioned petitioner under Rule 11 for filing frivolous lawsuits and awarded defendants their costs and attorneys fees.

"Petitioner appealed Judge Real's decisions to the Federal Circuit (Case Nos. 88-1195 to 88-1198), which affirmed the judgments in all respects. *See Constant v. Wilson, Constant v. Hillman, Constant v. Hitachi America, Ltd., Constant v. Hoff*, 856 F.2d 202 (Fed. Cir. 1988) (mem.). The Federal Circuit also levied its own sanctions against petitioner for filing a frivolous appeal and awarded costs and attorneys fees to defendants....

[Quotations from opinion omitted]

"Petitioner subsequently filed a petition for writ of certiorari as to the Fraud Cases. This petition was denied. *See Constant v. Hitachi*, 493 U S. 936, 110 S. Ct. 330 (1989).

"In 1988, petitioner filed another patent infringement case (involving a different patent than those in Patent Case I) against many of the same defendants as in the earlier patent case. *See Constant v. Advanced Micro-Devices, Inc.*, Case No. 88-00784 SVW (C.D. Cal.) ("Patent Case II"). This action was dismissed with prejudice by Judge Wilson for petitioner's continued refusal to comply with a court order to replead his complaint. In dismissing the complaint, Judge Wilson explained "[t]hat the Court is aware that dismissal with prejudice is a severe sanction to impose on a pro se litigant. However .... [h]is pro se status will not shield him from the consequences which any federal litigant must face if he or she insists on pursuing a course of conduct which shows a complete lack of respect for the federal courts." *Constant v. Advanced Micro-Devices, Inc.*, No. 88-00784 SVW unpublished order at 6-7 (C.D Cal. Oct. 31, 1988).

"Petitioner appealed the dismissal in Patent Case II to the Court of Appeals for the Federal Circuit, which affirmed the dismissal and again sanctioned petitioner for "filing and maintaining this completely unfounded and vexatious appeal." *Constant v. Advanced Micro-Devices, Inc.*, No. 89-1222 unpublished memorandum decision at 3 (Fed. Cir. April 11, 1989); *see Constant v. Advanced Micro-Devices, Inc.*, 873 F.2d 1451 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for writ of certiorari as to the dismissal was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 814, 110 S. Ct. 62 (1989).

"Also in 1988, respondent Advanced Micro Devices, Inc. (AMD) was forced by petitioner's claims in Patent Case II to file an action against petitioner in the Northern District of California for a declaratory judgment that certain other of petitioner's patents were invalid and not infringed by AMD. *See Advanced Micro-Devices, Inc. v. Constant* No. C 88 20101 (N.D. Cal.) (the "DJ Case"). The District Court found on summary judgment that one of petitioner's patents was invalid and that two others were not infringed. Petitioner appealed this judgment to the Federal Circuit, which affirmed. *See Advanced Micro-Devices, Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for a writ of certiorari was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 1057, 110 S. Ct. 868 (1990).

"Yet another action filed by petitioner in 1988, while petitioner's appeal in Patent Case I was pending, was a suit against the United States government in the United States Claims Court asserting that the United States Patent and Trademark Office had somehow breached "patent grant contracts" by issuing him patents that were found to be invalid. *See Constant v. United States*, No. 295-88 (C1. Ct. 1988) ("PTO Case"). The Claims Court dismissed this action, and petitioner appealed to the United States Court of Appeals for the Federal Circuit, which affirmed. *See Constant v. United States*, 861 F.2d 728 (Fed. Cir. 1988) (mem.), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789 (1989).

"Two years later, in August 1990, petitioner filed a motion for relief from the Claims Court's dismissal of his PTO Case. The Claims Court denied petitioner's motion,

and petitioner appealed. The Federal Circuit once again affirmed the dismissal and once again sanctioned petitioner for filing a frivolous appeal, concluding that "[g]iven the number of actions he has filed and the frequency and persistence with which he continues to attempt to relitigate the same theories which have consistently and finally been rejected as meritless, the inescapable conclusion is that Mr. Constant 'is engaged in "recreational" litigation....'" *Constant v. United States*, 929 F.2d 654, 659 (Fed. Cir. 1991), *cert. denied*, 111 S. Ct. 2799 (1991). The Court of Appeals further directed the clerk of the court, "[i]n light of Constant's continuous abuse of the appellate process," "to accept for filing no motion, petition, pleading or other fileable paper from James Constant without an order of the court approving the filing." *Id.*

[The following passages, again quoting verbatim from the earlier brief, describe the specific litigation that gave rise to Mr. Constant's petition for certiorari in appeal number 93-1518.]

"In September 1989, petitioner filed a voluntary bankruptcy petition under Chapter 11 (later converted to Chapter 7) in the United States Bankruptcy Court for the Central District of California (*In re James Constant*, LA-89-19270 KL). Nearly all of the creditors' claims identified by petitioner in the bankruptcy petition consisted of claims, made by those defendants that petitioner had previously sued, for payment of the costs and sanctions imposed on him by the various district and appellate courts.

"In August 1991, in yet another attempt to relitigate his previously rejected claims of patent infringement, fraud,

conspiracy, and other causes of action from Patent Cases I and II, the Fraud Cases, and the DJ Case, petitioner filed a complaint in the Bankruptcy Court against the defendants in the prior cases, their attorneys of record, and the bankruptcy trustee. This complaint began the present lawsuit from which petitioner now seeks certiorari. In this complaint, petitioner objected to the defendants' creditor claims on the grounds that they were based on "void judgments obtained through fraud" and rendered without subject matter jurisdiction or due process and sought to set aside all of the prior federal courts' "orders and judgments," to obtain money damages and injunctive relief for the purported injustice done to him in earlier actions, and to disbar the defendant attorneys.

[Petitioner's complaint was ultimately transferred to Chief Judge Real, who had heard the previous Fraud Cases. Petitioner then filed suit against Judge Real, accusing him of criminality and bias. Judge John G. Davies found no cause to disqualify Judge Real.]

"Respondent Fujitsu subsequently moved to dismiss petitioner's complaint with prejudice on the grounds that it was barred under the doctrine of res judicata and to enjoin petitioner from filing any further actions against the defendants without first obtaining the permission of the Court. This motion was granted by Judge Real, and the Court entered its orders of dismissal and injunction on March 12, 1992.

[Judge Real also granted a motion for sanctions and entered an order assigning certain patents to the United States Marshall for judicial sale.]

"Petitioner separately appealed to the United States Court of Appeals for the Ninth Circuit from the three district court final orders dismissing his complaint (Appeal No. 92-55465) [footnote omitted] awarding Rule 11 sanctions (Appeal No. 9256220), and assigning his patents and copyright (Appeal No. 92-56475). The Ninth Circuit affirmed the decisions of the District Court in their entirety, holding that petitioner's complaint was barred under the doctrine of res judicata, that the District Court did not abuse its discretion in awarding Rule 11 sanctions, and that the assignment of petitioner's patents and copyrights was proper. *See In re James Constant*, 12 F.3d 1105 (9th Cir. 1993) (mem.); Petition App. A. Although declining to award sanctions against petitioner, the Ninth Circuit also noted in its unpublished memorandum decision that "Constant's claims are wholly without merit, and his appeals are especially frivolous in light of his long history of repeatedly litigating the same claims despite repeated warnings... that he would be sanctioned...." Petition App. A 10.

IV. Background Leading to Appeal to This Court in Cause Number 94-782

Mr. Constant's petition for certiorari in cause number 94-782 involved an adversary proceeding filed by the Chapter 7 Trustee in Mr. Constant's bankruptcy case to recover twenty-two patents fraudulently conveyed by debtor to his wife, Argery Constant. Debtor attempted to intervene in the adversary proceeding against his wife, but that motion was denied. The bankruptcy court, after trial, set aside the conveyances. Mrs. Constant appealed this judgment to the District Court, and Mr. Constant also appealed the denial of

his motion to intervene. From the District Court's dismissal of both appeals and award of sanctions, the Constants appealed to the Ninth Circuit, which affirmed the actions of the District Court and imposed additional sanctions. The Constants then filed a petition for review which this Court denied by Order issued January 9, 1995.

ARGUMENT

I. The Ninth Circuit's Pre-Filing Review Order Is A Valid Exercise of its Inherent Power to Prevent Vexatious and Frivolous Appeals.

Respondent Advanced Micro-Devices, Inc. was not a party to the proceeding which led to issuance of the October 20, 1994 pre-filing review order of the Court of Appeals, and it has not yet been directly affected by, or benefitted from that order. Respondent will therefore limit its main argument in this brief to the second question presented. Respondent notes, however, that the pre-filing order appears to be a valid exercise by the Ninth Circuit of its power to prevent judicial proceedings before it from being used for abusive or vexatious purposes.

A court has inherent power to determine whether its process is used for the purpose of vexation or fraud, instead of the single purpose for which it is intended--the adjudication of bona fide controversies. It is the duty of the court to prevent such abuse, and a dismissal of the cause is an appropriate way to discharge that duty.

Pueblo De Taos v. Archuleta, 64 F.2d 807, 813 (10th Cir. 1933). *See also, Chambers v. NASCO, Inc.*, 501 U.S. 32

(1991), *reh. den.* 501 U.S. 1269 (1991); *Link v. Wabash Railroad Company,* 370 U.S. 626 (1962); *Pueblo of Santa Rosa v. Fall,* 273 U.S. 315, 319 (1927); *Gumbel v. Pitkin,* 124 U.S. 131, 144 (1888).

II. An Extraordinary Writ, A Drastic Remedy Intended For Use Only in Exceptional Cases, Is Clearly Inappropriate.

Petitioner, who has finally exhausted his avenues for appellate review in his persistent attempts to relitigate the same issues time and again, has now tried yet another approach.

This Court has expressly cautioned litigants that a writ issued under 28 U.S.C. § 1651(a) is a matter of the Court's "discretion, sparingly exercised", and that discretion is reserved for situations where "there are present exceptional circumstances". Supreme Court Rule 20.1. The rule limits this unusual remedy to litigants who cannot obtain "adequate relief...in any other form or from any other court." *Id.*

Petitioner Constant submits that the requirement of no other adequate remedy is satisfied here because "all appeals have been finally exhausted". Petition 5. It is precisely for that reason, *i.e.*, because all of Mr. Constant's arguments in his many appeals have been resolved against him, that this Court should dismiss the petition. In *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947), this Court stated,

Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt

power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

Accord, In re Sindram, 498 U.S. 177, 179 (1991), *reh. den.* 498 U.S. 1116 (1991) ("[T]he granting of an extraordinary writ is, in itself, extraordinary.")

Just as extraordinary writs of *mandamus* are not to be used as a substitute for appeal *before* a litigant has had an opportunity to appeal, they are not an appropriate substitute for an appeal *after* a decision has been rendered by lower court. *Ex parte Morgan*, 114 U.S. 174 (1885). In *Morgan*, the Court stated:

If there is error in the judgment as rendered, it cannot be corrected by *mandamus* but resort must be had to a writ of error or an appeal.

114 U.S. at 175 (citations omitted). Here, petitioner has pursued every avenue of appeal, including seven petitions to this Court for writs of certiorari to the Federal Circuit and two petitions for writs of certiorari to the Ninth Circuit. Therefore, issuance of a writ could not be "in aid of the Court's appellate jurisdiction", as required by Rule 20.1, because the Court's appellate jurisdiction has already been sought, and his petitions for certiorari denied, in the exercise of that appellate jurisdiction.

Extraordinary writs may be appropriate in cases where a court has exceeded its jurisdiction or refused to exercise its jurisdiction, *see, e.g.*, *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943) and cases cited therein, or where appellate review may be defeated if a writ is denied, such as *State of Maryland v. Soper*, 270 U.S. 9, 29-30 (1926), but such a situation does not obtain here.

Nor can Mr. Constant establish any abuse of discretion by the Ninth Circuit. In *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953), this Court reviewed the action of the Fifth Circuit in granting a motion to sever and transfer a criminal case for improper venue in the context of a petition for extraordinary writ. In denying the writ, the Court observed that the ruling by the district judge was made "in the course of the exercise of the court's jurisdiction to decide issues properly brought before it." *Id.* at 382.

The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in De Beers Consolidated Mines v. United States, 1945, 325 U.S. 212, 217, 65 S. Ct. 1130, 1133, 89 L. Ed. 1566. This is not such a case.

346 U.S. at 383. The Court also stated that the petitioner had not met the burden of showing that its right to issuance of the writ was "clear and indisputable". *Id.* at 384. *Accord, Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402 (1976) ("...to be

invoked only in extraordinary situations."); *Will v. United States*, 389 U.S. 90 (1967) ("drastic and extraordinary" remedy). In his petition for issuance of an extraordinary writ, Mr. Constant sets forth no "exceptional circumstances warranting the exercise of the Court's discretionary powers". Sup. Ct. R. 20.1.

Petitioner and respondents have previously briefed and argued the issues claimed to justify an extraordinary writ many times, in many federal court proceedings. His arguments have been fully considered and resolved against him. Once again, and this time, finally and conclusively, this Court should deny relief to this vexatious and recreational litigant.

CONCLUSION

For the reasons set forth above, the Petition for Extraordinary Writ should be denied. Respondent also submits that an award of sanctions against petitioner, in the form of respondent's attorneys' fees and costs, would be appropriate under the circumstances.

Date: February 15, 1995

Respectfully submitted,

ANTHONY de ALCUAZ
Counsel of Record for
Respondent Advanced Micro-
Devices, Inc.

SKJERVEN, MORRILL,
MacPHERSON, FRANKLIN
AND FRIEL
25 Metro Drive, Suite 700
San Jose, California 95110
(408) 283-1222

STATUTES AND RULES

The following is the pertinent text of the statutes and rules involved in this case:

11 U.S.C. § 363(b)(1), (m)

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 544(b)

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

28 U.S.C. § 157(b)(1), (b)(2)(A), (H), (O)

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate

orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-- . . . .

(A) matters concerning the administration of the estate; . . . .

(H) proceedings to determine, avoid, or recover fraudulent conveyances . . . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 158(d)

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1295(a)(1)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title . . . .

28 U.S.C. § 1334(a), (b), (e)

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

. . . .

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1338(a)

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

35 U.S.C. § 261

. . . .

An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

Supreme Court Rule 20(1)

Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.